IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-110

DAVID GELBARD and SIDNEY PARNAS,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
FILED
MAR 8 1972
E. ROBERT SEAVER, CLERK

No. 71-263

UNITED STATES OF AMERICA,

Petitioner,

—v.—

JOQUES EGAN,

Respondent.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

MELVIN L. WULF
SANFORD JAY ROSEN
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010
Attorneys for Amicus Curiae

WILLIAM J. BIRTLES
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

THOMAS HARVEY
American Civil Liberties Union
Foundation of Greater Philadelphia
260 South 15th Street
Philadelphia, Pennsylvania 19102

LAURENCE R. SPERBER
American Civil Liberties Union
Foundation of Southern California
323 West Fifth Street
Los Angeles, California 90013
Of Counsel

INDEX

PAGE

Interest of *Amicus* 1

Statement of the Cases 2

ARGUMENT

I. A witness before a grand jury has a constitutional right to refuse to answer questions propounded to him when the basis for the questions is electronic surveillance of him conducted by the Government in violation of the Fourth Amendment 3

A. These Witnesses Have Constitutional Standing 4

B. The Exclusionary Rule Requires That the Witnesses' Claims Be Upheld 9

II. The Omnibus Crime Control and Safe Streets Act of 1968 provides that a witness before a grand jury has standing to challenge his subpoena as well as questions which might be put to him on the ground that they are the result of illegal electronic surveillance 12

A. The Statutes 13

III. The problem of delay 19

CONCLUSION 21

Table of Authorities

PAGE

Cases:

Alderman v. United States, 394 U.S. 165 (1969) 5, 10
Application of Linen Supply Cos., 15 F.R.D. 115 (S.D. N.Y. 1953) 7

Baker v. Carr, 369 U.S. 186 (1962) 6
Bee See Books v. Leary, 291 F. Supp. 622 (S.D.N.Y. 1968) 11
Blair v. United States, 250 U.S. 273 (1918) 8, 9
Blue v. United States, 384 U.S. 251 (1965) 17, 18
Brown v. Walker, 161 U.S. 591 (1895) 7

Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971) 6, 8, 18
Cobbledick v. United States, 309 U.S. 323 (1940) 16

Flast v. Cohen, 392 U.S. 83 (1968) 8
Frothingham v. Mellon, 262 U.S. 447 (1923) 8
Furniture Workers Local 309 v. Gates, 75 F. Supp. 620 (N.D. Ind. 1948) 11

Hale v. Henkel, 201 U.S. 43 (1906) 7, 16
Harrison v. United States, 392 U.S. 219 (1968) 9

In re Calandra, No. CR. 71-300 (N.D. Ohio, October 19, 1971) 20
In re Carol Evans, No. 71-1499 (D.C. Cir. July 23, 1971) 14, 19, 20
In re Dionisio, 442 F.2d 276 (7th Cir. 1971) 3, 7
In re Egan, 450 F.2d 199 ..... 15, 18, 19, 20

	PAGE
Jackson v. Denno, 378 U.S. 368 (1964)	20
Jones v. United States, 362 U.S. 257 (1960)	5
Katz v. United States, 389 U.S. 347 (1967)	5
Konigsberg v. State Bar, 366 U.S. 36 (1961)	6
Lopez v. United States, 373 U.S. 427 (1963)	9
Mapp v. Ohio, 367 U.S. 643 (1961)	4
Mara v. United States, No. 71-GJ-460 (7th Cir. Dec. 1, 1971)	7
Olmstead v. United States, 277 U.S. 438 (1928)	4, 9
Quinn v. United States, 349 U.S. 155 (1955)	18
Schwimmer v. United States, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956)	7
Shelton v. Tucker, 364 U.S. 479 (1960)	6
Silverman v. United States, 365 U.S. 505 (1961)	4
Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)	9
Stanford v. Texas, 379 U.S. 476 (1965)	6
Townsend v. Sain, 372 U.S. 293 (1963)	20
Ullman v. United States, 350 U.S. 422 (1956)	7
United States v. McLeod, 385 F.2d 734 (5th Cir. 1967)	11
United States v. Oregon, 366 U.S. 643 (1961)	18
United States v. Rumely, 345 U.S. 41 (1953)	6
United States v. United Automobile Workers Union, 352 U.S. 567 (1957)	9
Watkins v. United States, 354 U.S. 178 (1957)	6
Weeks v. United States, 232 U.S. 383 (1914)	4

PAGE

Constitutional Provisions:

United States Constitution
- Article I, Section 4 8
- First Amendment 7, 8, 9, 11
- Fourth Amendment 3, 4, 5, 7, 8, 9, 10, 11
- Fifth Amendment 7, 18

Rules:

Fed. R. Crim. P., Rule 1 16
Rule 6 16

Statutes:

18 U.S.C. §2510 *et seq.* 2, 14, 16
18 U.S.C. §2515 ..... 13, 14, 15
18 U.S.C. §2517(3) 15
18 U.S.C. §2518(10)(a) 13, 14, 15, 16, 17, 18
18 U.S.C. §2519 19
18 U.S.C. §3504 16
18 U.S.C. §3504(a)(3) 19

Omnibus Crime Control and Safe Streets Act of 1968, Title III
- Section 801 12
- Section 801(b) 12
- Section 801(d) 12

Organized Crime Control Act of 1970
- Section 702 16

PAGE

Other Authorities:

Schwartz, *A Report on the Costs and Benefits of Electronic Surveillance* (1971) ii 10-11

Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 Mich. L. Rev. 455 (1969) 12

S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), 1968 U.S. Code, Cong. & Ad. News 2112 ..... 15, 17

Thorne, *Construction of Statute*, in *How to Find the Law* (1949) at 353 16

34 Words and Phrases at 190 (Perm. ed.) and 1970 Pocket Part at 25 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-110

DAVID GELBARD and SIDNEY PARNAS,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

No. 71-263

UNITED STATES OF AMERICA,

Petitioner,

—v.—

JOQUES EGAN,

Respondent.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus**

The American Civil Liberties Union is a nationwide nonpartisan organization of over 170,000 members dedicated

* Letters of consent from the Government and from counsel for Petitioners Gelbard and Parnas and Respondent Egan to the filing of this brief have been filed with the Clerk.

solely to preservation of the liberties safeguarded by the Bill of Rights. During its fifty-one year existence the ACLU has been concerned particularly with devices used by the Government to invade the privacy of citizens. ACLU policy stands unequivocally opposed to electronic surveillance by any person or agency for any reason whatever. The ACLU also opposes the admission of illegally obtained evidence in any legal proceeding.

In the context of grand jury proceedings the ACLU believes that witnesses should have full procedural protection when questioned by a grand jury, including standing to allege invasion of their constitutional rights by the Government. The ACLU does not believe that a grant of immunity, however broad, is sufficient to protect a witness' constitutional rights. All these issues are involved in these cases.

Statement of the Cases

These cases involve the meaning of the Omnibus Crime Control and Safe Streets Act of 1968, Sections 2510 *et seq.*, which regulates electronic surveillance by the Federal Government.

The facts in both cases are essentially similar. Petitioners in *Gelbard* and Respondent in *Egan* were subpoenaed to appear before grand juries investigating various criminal offenses. Petitioners in *Gelbard* alleged that certain questions put to them were based on information obtained by the Government by illegal wiretapping. Respondent in *Egan* alleged that her subpoena and the questions put to her were based on information gained

by the Government by illegal wiretapping and electronic surveillance.

Petitioners' claim in *Gelbard* was rejected by the United States District Court for the Central District of California and, on appeal, by the Ninth Circuit Court of Appeals on the ground that Petitioners did not have standing to make such a claim. Respondent's claim in *Egan* was accepted by the Third Circuit Court of Appeals sitting *en banc*, which specifically held that a witness before a grand jury has standing to challenge the illegal basis of his subpoena and the questions put to him where it is claimed that they are based on information obtained as a result of illegal electronic surveillance.

ARGUMENT

I.

A witness before a grand jury has a constitutional right to refuse to answer questions propounded to him when the basis for the questions is electronic surveillance of him conducted by the Government in violation of the Fourth Amendment.

The Government claims that an individual subpoenaed to appear before a grand jury as a result of illegal electronic surveillance has no standing to challenge the subpoena or questions based on the illegally obtained evidence. *Brief for the United States* at 5. "That argument is not persuasive for it appears to be founded on the premise that the grand jury may . . . compel production of evidence in violation of the Fourth Amendment," *In re Dionisio*, 442 F.2d 276, 279-80 (7th Cir. 1971). But as this Court has said: "Nothing can destroy a Government more quickly

than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp* v. *Ohio,* 367 U.S. 643, 659 (1961).

This Court has held that the Government cannot make use in a criminal trial of illegally seized material, or the fruits of that seizure. *Weeks* v. *United States,* 232 U.S. 383 (1914); *Mapp* v. *Ohio,* 367 U.S. 643 (1961). At least part of the rationale for prohibiting the use of illegally seized material is based on the unwillingness of this Court to allow the judiciary to take any part in the illegal venture. *Olmstead* v. *United States,* 277 U.S. 438, 471, 485 (1928) (Brandeis, J., dissenting); *id.* at 469-70 (Holmes, J., dissenting). The Federal grand jury as an arm of the judiciary should not be exempt from the policy. The grand jury is a *creature* of the federal courts. It is convened by them, and depends on them to enforce its orders. To allow the federal government to use illegal evidence before a grand jury will thus tarnish the reputation of the court system and thwart this Court's efforts to restrain illegal action on the part of the police.

A. *These Witnesses Have Constitutional Standing*

The fourth amendment to the United States Constitution prohibits unreasonable searches and seizures. Initially the fourth amendment was held to apply only to tangible property such as buildings, rooms, cars, desks and envelopes. In fact, a physical trespass was required to violate the amendment (*Olmstead* v. *United States,* 277 U.S. 438 (1928)), but the application of the trespass requirement resulted in strained analysis (*Silverman* v. *United States,* 365 U.S. 505 (1961)).

Consequently, this Court in *Katz* v. *United States,* 389 U.S. 347 (1967) discarded the notion that a search required a physical penetration of a private protected area, and held that the fourth amendment protects people not places, and conversations as well as tangibles. And it is now clear that electronic surveillance is a "search and seizure" within the ambit of the fourth amendment. *Id.* at 353.

In addition to its substantive holding, *Katz* also relaxed the requirements for standing to suppress evidence. As the Court held in *Alderman* v. *United States,* 394 U.S. 165 (1969), one has standing with regard to conversations in which he participated. In his separate opinion, Mr. Justice Harlan elaborated by saying: "Standing should be granted to every person who participates in a conversation he legitimately expects will remain private—for it is such persons that Katz protects." 394 U.S. at 191 (concurring in part and dissenting in part).

The parties in these cases fall squarely within the rule of standing laid down in *Alderman.* In *Egan,* respondent claims that her own phone was tapped illegally. In *Gelbard* and *Parnas,* petitioners claim that the phones of third parties were tapped illegally. In both cases, however, the parties claim that *their own conversations* were overheard and recorded—conversations which they had a right to consider confidential. They are clearly "victim[s] of an invasion of privacy." *Jones* v. *United States,* 362 U.S. 257, 261 (1960), and are entitled to protection of the fourth amendment. See *Alderman* v. *United States,* 394 U.S. at 176. The invasion of their constitutional rights makes clear that they have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court

so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

Such a witness has clearly suffered immediate and serious harm. He is entitled to challenge the illegal basis of his subpoena or questioning, because no other effective means can be devised to guarantee the full range of his essential constitutional rights. Reliance upon the application of the exclusionary rule at a future criminal trial to vindicate one's constitutional rights is quite insufficient. Delay in the vindication of the constitutional rights might well take months or even years. And in many cases no criminal proceedings will be brought, and the Government will thus be able to act illegally with impunity.

Further, delay chills the first amendment rights of the witness and his associates. *United States* v. *Rumely*, 345 U.S. 41 (1953); *Watkins* v. *United States*, 354 U.S. 178 (1957); *Shelton* v. *Tucker*, 364 U.S. 479, 486 (1960) (Stewart, J.); *Konigsberg* v. *State Bar*, 366 U.S. 36 at 73-74 (1961) (Black, J., dissenting). On the relationship between the first and fourth amendments, see especially *Stanford* v. *Texas*, 379 U.S. 476 (1965). In the context of secret grand jury proceedings, being compelled to testify drives a "wedge of mistrust" between them. *Caldwell* v. *United States*, 434 F.2d 1081, 1084 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971). It also may expose the witness to considerable public obloquy.

Surely these threats to fragile constitutional rights should not be tolerated. The constitutional issue is ripe for adjudication at the time the witness is called before the grand jury.

This analysis is in no way affected by grants of immunity to grand jury witnesses. The fifth amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." Its prohibition is absolute and protects a witness from the risk of *prosecution*, it acts as a "safeguard of conscience and human dignity and freedom of expression," and protects him from all compulsory testimony "which would expose him to infamy and disgrace." *Brown* v. *Walker*, 161 U.S. 591, 631 (1895) (Field, J., dissenting). See generally *Ullman* v. *United States*, 350 U.S. 422, 443-455 (1956) (Douglas, J., dissenting). No grant of immunity can adequately protect the infringement of fourth amendment rights involved in these cases, especially in light of the resultant effect on critical first amendment rights.

It is now well settled that the fourth amendment is applicable to the grand jury process. In *Hale* v. *Henkel*, 201 U.S. 43 (1906), this Court held that a grand jury subpoena for the production of books and papers constituted an unreasonable search and seizure. Since *Hale* v. *Henkel*, courts have struck down grand jury subpoenas which were unreasonable under the fourth amendment. *Schwimmer* v. *United States*, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956); see *Application of Linen Supply Cos.*, 15 F.R.D. 115 (S.D.N.Y. 1953). But the fourth amendment is not limited only to overbroad grand jury subpoenas calling for documentary evidence. It has been applied in other situations. *In re Dionisio*, 442 F.2d 276 (7th Cir. 1971) (furnishing of handwriting exemplars); *Mara* v. *United States*, No. 71-GJ-460 (7th Cir. Dec. 1, 1971) (same).

The Government's description of *Blair* v. *United States,* 250 U.S. 273 (1918), is grossly misleading. The Government contends that *Blair* holds that witnesses before a grand jury cannot challenge under the first amendment the validity of the statutes the violations of which the grand jury was investigating. But the first amendment is not even mentioned in the opinion of the Court. The case actually involved a claim that the Federal Corrupt Practices Act was unconstitutional under Article I, Section 4 of the United States Constitution.

Thus the cases now before the Court are quite different from the *Blair* case. First, like Mrs. Frothingham of *Frothingham* v. *Mellon;* 262 U.S. 447 (1923), Blair contended that a federal statute was beyond congressional power. Of course the Court ruled that he lacked standing. Accord, *Frothingham* v. *Mellon, supra;* see *Flast* v. *Cohen,* 392 U.S. 83 (1968). On the other hand, the witnesses in *Egan* and *Gelbard,* like the plaintiffs in *Flast* v. *Cohen, supra,* contend that the government's action breaches express limitations on government power, namely the first and fourth amendments. Applying the test articulated in *Flast* and elsewhere, they clearly have constitutional standing to assert this claim.

Second, in the instant cases, unlike in *Blair,* there is no challenge to the jurisdiction of the grand jury or to the validity of the statutes the violations of which were being investigated. The witnesses in these cases seek only to challenge the illegal basis of their own subpoenas and the questions put to them on fourth amendment grounds as ramified by the first amendment. Cf. *Caldwell* v. *United States,* 434 F.2d 1081 (9th Cir. 1970), *cert. granted,* 402 U.S. 942 (1971).

Third, the constitutionality of criminal statutes is not to be resolved in advance of necessity. E.g., *United States* v. *United Automobile Workers Union*, 352 U.S. 567 (1957). Orderly adjudication requires that such decisions be made only after full evidentiary proceedings in which the factual context of the statute's application is elaborated. *United States* v. *United Automobile Workers Union, supra.* That is the point of *Blair.* To be contrasted are situations like the present ones. The factual issues can easily be resolved without a full criminal trial. The constitutional claim is that the government has acted unlawfully from beginning to end, to such an extent that if it is permitted to continue, the courts themselves will be embroiled in the illegality. Cf. *Olmstead* v. *United States*, 277 U.S. 438 (1928).

B. *The Exclusionary Rule Requires That the Witnesses' Claims Be Upheld.*

In *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920), Mr. Justice Holmes, delivering the opinion of the Court, said "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used [by the Government] at all." Consequently, the fourth amendment prevents the Government from using illegally seized evidence as the basis for questioning aggrieved parties before a grand jury. *Silverthorne* has recently been affirmed by this Court. *Harrison* v. *United States*, 392 U.S. 219, 222 (1968).

Unlawful wiretapping may jeopardize first amendment rights by inhibiting the free exchange of ideas, and because by nature it is hidden, see *Lopez* v. *United States*, 373 U.S. 427, 469-70 (1963) (Brennan, J., dissenting). It

is, therefore, even more offensive to a free society than the unlawful search and seizure of tangibles. See *Alderman* v. *United States*, 394 U.S. 165, 203 (1969) (Fortas, J.; concurring in part and dissenting in part).

Electronic surveillance is a great deal less "reasonable" than any other type of search because it is impossible to anticipate the exact contents of a bugged conversation; therefore, electronic surveillance always involves "general searches" clearly forbidden by the Fourth Amendment. When one person's telephone is tapped, anyone who communicates with that person is overheard. Indeed, the increasing use of electronic surveillance by government results in massive invasion of the privacy of tens of thousands of citizens but very few criminal convictions.

The reported statistics of wiretapping by federal and state government make this quite clear.* In 1969, court-reported federal wiretapping intercepted 44,940 conversations by 4,560 people. 36,840 of these conversations were said to be "incriminating," but they yielded only 139 arrests and 24 convictions. As of December 31, 1970, in 1970 court-reported federal wiretapping intercepted 147,780 conversations by 10,260 people. 102,780 of these conversations were said to be "incriminating," but they yielded only 613 arrests and 48 convictions. (*A Report on the Costs and Benefits of Electronic Surveillance* ii-iv (1971) by Professor Herman Schwartz of the Law School

---

* TOTALS FOR 1968-70

Year	Orders	Installations	People	Conversations
1968	174	147	4,312	66,716
1969	302	271	31,436	173,711
1970	597	583	25,652	381,865

Source: H. Schwartz, *A Report . . . , infra* in text.

of the State University of New York at Buffalo.) Preliminary reports for 1971 indicate that the number of court-reported federal conversations intercepted has increased five-fold over 1970.

The reported figures are misleadingly low. First, they are based upon government self-reporting, which well may not be reliable. Second, they do not include the use of "bugs" as opposed to wiretaps. Third, they do not include wiretaps made where one party consents to his phone being tapped; and they do not include cases of "national security" wiretapping as to which the government claims a right to act without court supervision.

Even the government's own data indicate, however, that massive invasions of privacy are occurring, with very little direct gain for law enforcement. These invasions of privacy offend the fourth amendment and chill the exercise of first amendment rights of any citizen who has cause to fear that his or her phone is being tapped. Indeed, lower federal courts have noted in several cases that mere physical surveillance of protected activity by agents of some controlling authority is itself chilling enough to warrant judicial intervention. See *Furniture Workers Local 309* v. *Gates*, 75 F. Supp. 620 (N.D. Ind. 1948); *Bee See Books* v. *Leary*, 291 F. Supp. 622 (S.D.N.Y. 1968); cf. *United States* v. *McLeod*, 385 F.2d 734 (5th Cir. 1967). Intervention is even more urgently needed in the case of illegal wiretapping, which is so indiscriminate and insidious in its impact on first and fourth amendment rights. The danger to critical constitutional rights is so great that victims of illegal electronic surveillance should be able to invoke the exclusionary rule at the earliest possible occasion—when they are called as witnesses before a grand

jury—and thereby deny to the government the fruits of its lawless actions.

II.

The Omnibus Crime Control and Safe Streets Act of 1968 provides that a witness before a grand jury has standing to challenge his subpoena as well as questions which might be put to him on the ground that they are the result of illegal electronic surveillance.

Congress attempted to make wiretapping constitutional by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968. We think it did not succeed. See Schwartz; *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455 (1969). However, because Congress was sensitive to the constitutional considerations, it did endeavor to place stringent procedural safeguards on the power to wiretap. The Congressional findings set forth in Section 801 of the Act of 1968 explain that the purpose of Title III is *inter alia*, "to protect effectively the privacy of wire and oral communications" and "the integrity of court and administrative proceedings."* With these safeguards built into the

* "Section 801(b). In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings;

Section 801(d). To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent

Act, Congress assumed it to be constitutional. Suffice it to say that this constitutional issue need not be resolved in these cases, if the Court rules in favor of the grand jury witnesses who are now before it.

A. *The Statutes.*

18 U.S.C. Section 2515 provides:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

Section 2515 is an unequivocal bar to questioning a person before a grand jury if the questions are derived from electronic surveillance conducted in the absence of a properly issued warrant. The procedural mechanism for enforcing Section 2515 is found in Section 2518(10)(a) which provides in part that:

> "Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision there-

---

jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused."

of, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval."

Section 2510(11) defines "aggrieved person" for the purposes of the Omnibus Crime Control Act of 1968 as "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

Judge Adams in *Egan* and Chief Judge Bazelon in *In re Carol Evans,* No. 71-1499 (D.C. Cir. July 23, 1971) held that Section 2518(10)(a) on its own grants a witness before a grand jury standing under the 1968 Act. On the other hand Judge Rosenn in *Egan* and Judge Wright in *Evans* have held that Section 2515 on its own grants a witness before a grand jury standing in such cases. These are both valid interpretations of the statute. The position taken by *Amicus* is that the provisions of the Omnibus Crime Control and Safe Streets Act of 1968 *read either separately or together* grant such a witness standing.

Section 2515 specifically mentions a grand jury proceeding as one in which the fruits of illegal surveillance may not be used. The Senate Committee Report which accompanied the Act indicated the Committee's expectation that Section 2515 would be read in conjunction with Section

2518(10)(a),* but the Committee Report does no more here than restate the conventional maxim that a statute should be considered as a whole. It is not entitled to any greater weight.

While a grand jury hearing is not specifically mentioned in Section 2518(10)(a) as a proceeding to which the section applies, the section does not indicate that the listed proceedings are exclusively the ones for which the remedy is to be exercised. *In re Egan*, 450 F.2d 199, 203. Furthermore, a consistent reading of the statute as a whole clearly shows that Section 2518(10)(a) applies to a grand jury hearing. For example a motion to suppress under Section 2518(10)(a) may be made regarding the introduction of evidence obtained by illegal surveillance in "any . . . hearing, or proceeding in or before any court . . . or other authority of the United States." "Proceedings in court" encompasses many ancillary proceedings. See 34 Words and Phrases at 190-91 (Perm. ed.) and 1970 Pocket Part at 25-26.

The statute contains internal evidence that the word "proceeding" includes a grand jury proceeding. Section 2517(3) in authorizing disclosure of intercepted communications, speaks of "any *criminal* proceeding" and of "any . . . *grand jury* proceeding" (emphasis added). And Section 2515 encompasses "any . . . other proceeding in or

---

* "The provision must, of course, be read in the light of Section 2518(10)(a) discussed below, which defines the class entitled to make the motion to suppress." S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), 1968 U. S. Code, Cong. & Ad. News 2112, 2185 . . . . "This provision [Sec. 2518(10)(a)] must be read in connection with Sections 2515 and 2517 . . . which it limits." *Id.* at 2195. Because of the origin of the Act and the parliamentary procedure under which it was considered, there was no House Report on these relevant portions of the Act.

before any . . . grand jury." It is a basic rule of statutory interpretation that the same word should have the same meaning throughout the statute. See generally Thorne, *Construction of Statute,* in *How to Find the Law* at 353 (1949). Further, Rule 1 of the Federal Rules of Criminal Procedure defines "criminal proceeding" as inclusive of grand juries. Fed. R. Crim. P. Rule 6. Finally it should be noted that this Court has held that a grand jury is impanelled and proceeds under "the authority of the United States." *Hale* v. *Henkel,* 201 U.S. 43, 66 (1906); *Cobbledick* v. *United States,* 309 U.S. 323, 327 (1940). It is thus included in the class of proceedings to which Section 2518 (10)(a) is applicable.

This argument is reinforced by Section 702 of the Organized Crime Control Act of 1970, amending Title 18 by adding a new section, Section 3504, which lays down the procedure to be followed for litigation concerning sources of evidence, and thus clarifies §§2510 *et seq.* The term "grand jury" is explicitly used in §3504 and adds weight to the view advanced here that §2518(10)(a) applies to a grand jury hearing. Section 3504 provides:

> (a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—
>
> (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulations or standard promulgated pursuant thereto.

The Senate Committee Report which accompanied the Act of 1968* implies a different interpretation from that

* "Because no person is a party as such to a grand jury proceeding [Sec. 2518(10)(a)], does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforceable by an individual. (*Blue* v. *United States*, 384 U.S. 251 (1965).) There is no intent to change this general rule. It is the intent of this provision only that when a motion to suppress is granted in another context, its scope may include use in a future grand jury proceeding." S. Rep. No. 1097, 90th Cong., 2d Sess. 106 (1968), 1968 U. S. Code Cong. & Ad. News, 2112, 2195.

offered here. The Report suggests that grand jury witnesses do not have standing to move for the suppression of illegally obtained evidence. But, as demonstrated *supra*, the language of Section 2518 (10)(a) is quite clear when considered in the context of the statute. When the language of a statute is so clear and unequivocal a Congressional report is of little weight. *United States* v. *Oregon*, 366 U.S. 643, 648 (1961).

In any case, "[t]he legislative history is, to say the least, ambiguous." *In re Egan*, 450 F.2d 199, 206 (Adams, J.), as is it inconsistent with the authority cited by the Committee in its Report. *In re Egan*, 450 F.2d at 205-06. The Committee relies principally on *Blue* v. *United States*, 384 U.S. 251 (1965) as holding that a witness cannot question the character of evidence presented to a grand jury. But *Blue* v. *United States* is clearly inapposite, since it holds that if the government had submitted to a grand jury evidence obtained in violation of the Fifth Amendment, then by itself such action did not entitle *Blue* to have an indictment dismissed. No attempt is made in these cases to have an indictment dismissed. Moreover, it was pointed out earlier that witnesses before a grand jury have considerable freedom to withhold testimony from a grand jury on the basis of a constitutional, statutory or common law privilege. E.g., *Caldwell* v. *United States*, *supra*; *Quinn* v. *United States*, 349 U.S. 155 (1955). Presumably, the Committee Report intended these exceptions to remain.

At most the legislative history suggests that a person who has been illegally wiretapped but is not a witness called by the grand jury may not move to suppress, and that even a witness or defendant who objects to the use of illegal wiretaps in the proceedings may not move to quash

the entire proceeding or even an indictment growing out of it. *In re Egan,* 450 F.2d 199, 206. Such a witness may, however, move to suppress his subpoena or questions put to him if they are based on illegal surveillance.

III.

The problem of delay.

The government argues that the grand jury process should not be delayed to require the government to make a time consuming check of records to put it in the position of being able to answer whether or not a particular witness was ever overheard by electronic surveillance. *Brief for United States* at 26-27. Judge Gibbons in his dissent in *Egan* accepts this argument.

In Section 2519 of Title 18, Congress mandated that federal agencies report individual surveillances, and also periodically compile lists of surveillances lawfully made. The section came into force on June 19, 1968. Even a cursory review of available records should reveal the existence of any illegal surveillance undertaken after June 1968. Accord *In re Carol Evans,* No. 71-1499 (D.C. Cir., July 23, 1971), slip opinion at 16.

Congress has made specific provision for surveillances undertaken before June 19, 1968. The fruits of such surveillances are presumptively useless in investigating events that occur more than five years after the interception. Thus a party is not permitted to object to the admission of evidence tainted by unlawful surveillance if the surveillance was conducted more than five years before the event under investigation. 18 U.S.C. Section 3504(a)(3). Within a

very short time, therefore, the usefulness of all surveillance conducted before 1968 will be entirely exhausted, and the government should be able to resolve these disputes by consulting a readily accessible list. *In re Carol Evans,* No. 71-1499 (D.C. Cir., July 23, 1971), slip opinion at 17-18.

From a practical point of view a claim of delay is unfounded. The vast majority of witnesses are not and will not in the future be hostile to the government's position. Thus the grand jury's ability to gather information will not be seriously impaired. Furthermore, even if *all* future hostile witnesses stand mute and raise an illegal surveillance issue, presumably there will have been no surveillance in the vast majority of these cases, and a contempt hearing will take little longer than the prosecutor's representation to that effect. Only where there actually has been surveillance will a hearing be in any way extended. *In re Egan,* 450 F.2d 199, 220-21 (concurring opinion of Judge Rosenn). If a witness makes such a claim in an attempt to obstruct an investigation, the witness can still be compelled to answer as soon as the government demonstrates that no surveillance was conducted, or that such surveillance was lawful. *In re Carol Evans,* No. 71-1499 (D.C. Cir., July 23, 1971), slip opinion at 18.

Finally, it must be made absolutely clear that "Time properly consumed in the trial of a complex case, or analysis of complex or difficult issues, or in holding a hearing to determine whether one's constitutionally protected rights have been violated is not delay, as that term is used in the context of the courts. The issue implicit in the question of delay is whether the examination of third-party rights as they arise in the context of alleged bad conduct on the part of the Government is by definition dilatory, or unavoidable delay." *In re Calandra,* No. CR 71-300 (N.D. Ohio, October 19, 1971), slip opinion at 8. See e.g., *Jackson* v. *Denno,* 378 U.S. 368 (1964); *Townsend* v. *Sain,* 372 U.S. 293 (1963).

CONCLUSION

For the reasons set forth above, the judgment of the Third Circuit Court of Appeals in *United States* v. *Egan* should be affirmed, and the judgment of the Ninth Circuit Court of Appeals in *Gelbard* v. *United States* should be reversed.

Respectfully submitted,

MELVIN L. WULF
SANFORD JAY ROSEN
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010
Attorneys for Amicus Curiae

WILLIAM J. BIRTLES
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

THOMAS HARVEY
American Civil Liberties Union
Foundation of Greater Philadelphia
260 South 15th Street
Philadelphia, Pennsylvania 19102

LAURENCE G. SPERBER
American Civil Liberties Union
Foundation of Southern California
323 West Fifth Street
Los Angeles, California 90013
Of Counsel

March 1972